Supreme Court, U. S.
FILED
APR 11 1980

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1440

PAUL S. ADAMIAN,
Petitioner,

vs.

DR. LOUIS E. LOMBARDI, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents, Dr. Louis E. Lombardi, et al., respectfully submit their brief in opposition to petitioner's petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS DELIVERED BELOW

Petitioner's petition adequately sets forth references to opinions delivered in the courts below.

JURISDICTION OF THIS COURT

Petitioner's petition adequately sets forth a statement of the grounds on which the jurisdiction of this Court is invoked.

STATUTES INVOLVED

In addition to the citations set forth in petitioner's petition, Chapter 4, Section 2.3 of the University of Nevada System Code, which reads as follows, is involved:

> "The faculty member is a citizen, a member of a learned profession, and a representative of this University. When he speaks or writes as a citizen, he will be free from censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educator, he knows that the public may judge his profession and this University by his utterances. At all times he strives to be accurate, to exercise appropriate restraint, to show respect for the opinions of others, and to make every effort to indicate that he is not a spokesman for the University."

QUESTIONS PRESENTED FOR REVIEW

Respondents take issue with the argument presented in that portion of petitioner's petition entitled "Questions Presented" and with certain misstatements of facts included in the statements of Questions Presented. Those arguments and factual misstatements will be addressed in the argument section of this brief.

STATEMENT OF THE CASE

Petitioner, a tenured assistant professor of English at the University of Nevada, Reno, participated in a demon-

stration in protest of the Cambodian invasion and the Kent State University deaths. The demonstration occurred at Governor's Day ceremonies at the campus stadium on May 5, 1970. Petitioner was instrumental in leading a disruption of the ceremonies in the stadium. The disruption was more than speech and included leading raucous noises to disrupt the ceremonies; joining a group and motioning other demonstrators onto the field, thus creating a danger of violent confrontation between two bodies of people; and attempting to stop a motorcade into the stadium. This conduct occurred after petitioner and others had been given permission to march three times around the stadium in protest during the ceremonies. This conduct is discussed in the District Court's opinion (A. F-2 to Petitioner's Petition), and the opinions of the United States Court of Appeals for the Ninth Circuit (A. E-2 and A. H-2 to Petitioner's Petition) and in the Record. (Defendants' Exhibit B, Reporter's Transcript May 24, 1976, page 4)

The Board of Regents of the University directed that charges be brought against petitioner for violation of Chapter 4, Section 2.3 of the University Code which is set forth earlier in this brief. Specifically, petitioner was charged as follows:

> "(1) On Tuesday, May 5, you did participate in an attempt to stop a motorcade in front of the Jot Travis Union Building. This motorcade was part of an official University function. (2) On the same day you did participate in the disruption of the ceremony at Mackay Stadium in connection with the Governor's review of ROTC activities on this campus." (Defendants' Exhibit A, Reporter's Transcript May 24, 1976, page 4)

A Faculty Senate Hearing Committee provided petitioner with a due process hearing on the charges. In all the proceedings in this case, no question of lack of due process or fundamental fairness in that hearing has been raised. The Hearing Committee issued its findings and decision in the matter on October 28, 1970, finding that petitioner violated that part of the Code which states that the faculty member should strive " . . . to show respect for the opinions of others." The committee also concluded that the only relevant portion of Chapter 4, Section 2.3 of the University Code is that which indicates that the faculty member should strive " . . . to exercise appropriate restraint, to show respect for the opinions of others. . . ." (Defendants' Exhibit D, Reporter's Transcript May 24, 1976, pp. 4-5) The committee recommended that petitioner not be terminated, but that he be censured and advised that "conduct which seeks to disrupt a University activity is antithetical to the principles of an open society and cannot be condoned." The committee recommended that the censure also advise petitioner that future similar conduct by petitioner shall be considered cause of dismissal from the University. (Defendants' Exhibit D, Reporter's Transcript May 24, 1976, pp. 4-5) The Regents agreed with the Hearing Committee that petitioner's conduct warranted public censure and that such conduct constituted adequate cause for termination, but disagreed that such conduct must be repeated on a second occasion before termination of employment would be justified. (Defendants' Exhibit G, Reporter's Transcript May 24, 1976, page 5) The Regents determined that under the facts as found by the Hearing Committee in its initial findings and decision and its re-

view of the findings and decision, adequate cause for termination existed. The Regents indicated that they had reviewed the transcript of the hearing and the evidence before the committee with care prior to making their decision. (Defendants' Exhibit G, 2, Reporter's Transcript May 24, 1976, page 5) The Regents' decision was issued December 12, 1970. At a hearing before Judge Turrentine in the United States District Court for the District of Nevada, on May 24, 1976, Regents testified that their decision was based *solely* upon the transcript of the hearing before the Hearing Committee and the exhibits offered at that hearing. (Reporter's Transcript May 24, 1976 and May 25, 1976, pp. 15, 19, 20, 21, 26, 29, 31, 33, 34, 37, 54)

On July 23, 1971, petitioner filed an action in the United States District Court for the District of Nevada alleging violation of his constitutional rights under the First and Fourteenth Amendments to the United States Constitution. On April 16, 1973, a memorandum decision was entered by the District Court declaring Chapter 4, Section 2.3 of the University Code unconstitutional on its face because of vagueness and overbreadth. Partial summary judgments in favor of petitioner and respondents were accordingly entered on July 20, 1973. (A. C to Petitioner's Petition) On August 30, 1973, final judgment was entered. (A. D to Petitioner's Petition) Respondents appealed that final judgment on August 30, 1973. On September 24, 1975, the United States Court of Appeals for the Ninth Circuit reversed the partial summary judgment in favor of petitioner and remanded the case to the District Court with instruction to hear testimony from the Regents in order to determine whether the Regents' construction of Chapter

4, Section 2.3 of the University Code was the same as that of the American Association of University Professors, indicating that such a construction would overcome constitutional overbreadth problems. (A. E to Petitioner's Petition) Upon remand, the Regents testified that at the time of the termination of petitioner their construction of Chapter 4, Section 2.3 of the University Code was the same as that of the American Association of University Professors. Their testimony was uncontroverted. (Defendants' Exhibit N, Reporter's Transcript May 24, 1976, page 6) The case then came to trial on May 24, 1976. The parties agreed that the only issue of fact to be determined at trial was whether the Regents' construction of Chapter 4, Section 2.3 of the University Code was the same as that of the American Association of University Professors *at the time of plaintiff's (petitioner's) termination.* (A. F-6 to Petitioner's Petition) The parties stipulated that the facts relating to the events of May 5, 1970, could be determined by the Court from the transcript of the administrative hearing and from the exhibits received in evidence. *The Court held that petitioner was entitled to a de novo trial on the merits.* (A. F-7 to Petitioner's Petition)

The following six issues of law were before the Court and were ruled upon: (1) Is Chapter 4, Section 2.3 of the University Code unconstitutionally vague or overbroad; (2) Did plaintiff's termination violate his Fourteenth Amendment right to substantive due process; (3) Did plaintiff's termination violate his Fourteenth Amendment right to procedural due process; (4) Did plaintiff's termination violate his First Amendment right to freedom of speech; (5) Did plaintiff's termination violate his First

Amendment right to freedom of assembly; and (6) Did plaintiff's termination deny him his Fourteenth Amendment right to equal protection of the laws. (A. F-6 to Petitioner's Petition) The decision of the Court was a judgment in favor of the defendants on all counts. Petitioner appealed again to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit's review of the record disclosed no error below and affirmed the judgment of the District Court. (A. H-9 to Petitioner's Petition) The Ninth Circuit refused to review de novo the rulings of its earlier opinion. Petitioner filed a petition for rehearing and suggestion for rehearing en banc on October 30, 1979. The petition for rehearing was denied, and the suggestion for rehearing en banc rejected on December 18, 1979.

ARGUMENT

Petitioner's first question presented is: May the Court of Appeals deny to an appellant his right to have decided important and substantial due process issues which are dispositive of his right to retention as a tenured professor?

The primary issue before the Ninth Circuit in petitioner's first appeal to that Court was the question of vagueness and overbreadth of Chapter 4, Section 2.3 of the University of Nevada System Code. The obvious impact of the decision in that appeal (A. E to Petitioner's Petition) is that if the Regents' construction of that provision was the same as that of the American Association of University Professors, there is no vagueness and overbreadth. The Ninth Circuit in its second appeal by petitioner refused to review de novo the ruling of that opinion, holding that the prior ruling had become the law of the case, binding

upon the present panel based upon the evidentiary hearing conducted after remand in the first appeal, wherein testimony of the Regents indicated that the constructions of the Code provision by the Regents and the American Association of University Professors were the same at the time petitioner was dismissed from his position. As stated earlier herein, prior to his second appeal to the Ninth Circuit, petitioner received a trial de novo in the District Court, on six issues of law, including all of the issues which he argues at page 15 of his petition have never been judicially determined. They were indeed determined against him in the District Court. The Ninth Circuit, in the second appeal, stated that its review of the record below disclosed no error below and affirmed the judgment of the District Court. (A. H-9 to Petitioner's Petition)

Petitioner's second question presented is: Are the individual regents or the Nevada Courts the authoritative agency to construe statutes in the form of a University Code; and if the regents have authority to make such construction, is it binding when made years after the "extramural utterances" complained of were engaged in?

The University of Nevada System is an agency of the State of Nevada. University Code provisions have the force and effect of statute. *Richardson v. Board of Regents,* 70 Nev. 144, 261 P.2d 515 (1953). They are not, however, statutes, but regulations of a state agency. As such, courts are required to base their judgment as to their facial validity on their meaning as authoritatively construed by a state court or *agency. Gooding v. Wilson,* 405 U.S. 518, 520 (1972). The Board of Regents construed the last

sentence of Chapter 4, Section 2.3 of the University Code, which reads "at all times he strives to be accurate, to exercise appropriate restraint, to show respect for the opinion of others, and to make every effort to indicate that he is not a spokesman for this University," as stating causes for dismissal. Great deference must, therefore, be given to this construction of the regulations by the state agency which issues and enforces it. *Jablon v. Trustees of the California State Colleges,* 482 F.2d 997, 999 (9th Cir. 1973) cert. denied, 414 U.S. 1163 (1974). The second portion of petitioner's question presented is easily answered. That portion of the question states, ". . . and if the regents have authority to make such construction, is it binding when made years after the 'extramural utterances' complained of were engaged in." As indicated by the opinion of the District Court below, petitioner agreed that the only issue of fact to be determined at trial was whether the Board of Regents' construction of Chapter 4, Section 2.3 of the University Code was the same as that of the American Association of University Professors *at the time of plaintiff's termination.* (A. D-6 to Petitioner's Petition) The testimony of regents at the trial de novo on the merits at the District Court level in the Reporter's Transcript of Proceedings on Appeal, May 24, 1976, and May 25, 1976, as stated earlier herein, clearly indicates that their construction of the Code provision was the same as that of the American Association of University Professors at the time of the dismissal of petitioner. That testimony was uncontroverted. There has never been any question as to when the critical construction of the Code provision by the Regents had to be made.

Petitioner's third question presented is: After acquittal of charges arising out of war protest by a Hearing Committee empanel [sic] to try accused college professor, does the governing board of the University have the power to retry the professor in the presence of a direct, unretracted statement by a member of the board that the board was motivated by a desire to punish, deter and discourage further war protests at the University?

Petitioner was not acquitted of charges ensuing out of war protests by the Hearing Committee. The decision of the Hearing Committee is adequately discussed in the Statement of the Case, above. The governing board of the University did not "retry the professor." It reviewed the transcript of testimony taken by the Hearing Committee and the evidence presented to that committee. As set forth in the Statement of the Case above, the Board based its decision *solely* upon that transcript and evidence and not upon any statement by any member of the Board of Regents.

Petitioner's fourth question presented is: May a limiting construction on one portion of a statute cure vagueness and overbreadth of another portion of the statute?

Petitioner argues that the limiting construction by the AAUP of a portion of the Code provision involved, curing facial invalidity, dealt with "appropriate restraint." He argues further that petitioner was found to have failed to respect the opinion of others, another part of the Code provision. Petitioner was found by the Faculty Senate Hearing Committee to have violated that portion of the Code provision regarding failure to respect the opinion

of others. The committee found the entire section which reads ". . . to exercise appropriate restraint, to show respect for the opinions of others . . ." to be the relevant portion of Chapter 4, Section 2.3 of the University Code. (Defendants' Exhibit D, 5, Reporter's Transcript May 24, 1976, pp. 4-5) The Board of Regents found adequate cause existing for termination of petitioner's employment based upon its review of the transcript of proceedings before the Faculty Senate Hearing Committee and evidence presented in its proceedings. As stated by the Ninth Circuit in its decision on the first appeal by petitioner, the Regents construed the language of Chapter 4, Section 2.3 of the University Code "at all times he strives to be accurate, to exercise appropriate restraint, to show respect for the opinions of others, and to make every effort to indicate that he is not a spokesman for this University" to state adequate cause for dismissal. Petitioner was specifically charged with violation of Chapter 4, Section 2.3. The limiting construction of the section by the American Association of University Professors is, therefore, directly on point.

Petitioner's fifth question presented is: Under 28 U.S.C. § 1292, does the time for filing an appeal commence again after the filing of a restated rule 54(b) order in the form appended?

It should also be noted that petitioner argues that the procedural and jurisdictional issue of whether an appeal time can be revitalized by a court's filing a "restated" summary judgment should be determined by the Supreme Court in the interest of Circuit uniformity without benefit of

citation of any authority showing there is not Circuit uniformity.

As stated by the Ninth Circuit in the first appeal in this case (A. E-3 to Petitioner's Petition), the District Court's first order granting an injunction was an appealable interlocutory order. 28 U.S.C. § 1291(a)(1). An interlocutory appeal is permissive, not mandatory. The Regents were free to await the August final judgment and to appeal under 28 U.S.C. § 1291. *Caradelis v. Refineria Panama, S.A.*, 384 F.2d 589, 591 n. 1 (5th Cir. 1967); *Bingham Pump Co. v. Edwards,* 118 F.2d 338, 339 (9th Cir.) cert. denied, 314 U.S. 656 (1941). Petitioner has apparently disregarded entirely 28 U.S.C. § 1291 and relied entirely upon 28 U.S.C. § 1292. This issue was addressed in the first appeal to the Ninth Circuit. As stated earlier herein, subsequent to the decision of the Ninth Circuit in that first appeal remanding the case, petitioner was granted a trial de novo on the merits, had a decision rendered against him on all six issues before the District Court in that trial de novo and appealed that decision to the Ninth Circuit in the second appeal of the case. Although there are no defects in the first appeal procedure, even if there were one based on petitioner's argument, how can he now complain after a trial de novo was granted him after the first appeal and he appealed the decision against him in that trial de novo? Any alleged defect in appeal procedure in the first appeal has obviously been cured.

CONCLUSION

Petitioner has had all of his constitutional rights judicially determined by the federal courts over a period of almost ten years. There is no indication in this petition that the Ninth Circuit has decided an important state question in a way in conflict with applicable state law. There is no indication that the Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by the Supreme Court or has decided a federal question in a way in conflict with applicable decisions of the Supreme Court. No exercise of the Supreme Court's power of supervision is warranted.

Petitioner's petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

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